86-197

No. _____

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

S. C. SORENSEN,
SORENSEN RAMBLER, INC.,
Petitioners,

vs.

PAUL J. CAREY and
MARILYN IREN CAREY POTTER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether service of process by publication to a non-resident not reasonably calculated to give notice of lawsuit to a defendant is sufficient to give a court jurisdiction to render a money judgment.

2. Whether service of process by publication to a non-resident not reasonably calculated to give notice of lawsuit to a defendant affords due process.

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IN THE
SUPREME COURT OF THE UNITED STATES
1986 TERM

NO. _____

S. C. SORENSEN and SORENSEN RAMBLER, INC., et al.,

Appellants,

v.

PAUL J. CAREY and MARILYN IREN CAREY POTTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The Petitioners S. C. Sorensen and Sorensen Rambler, Inc. respectfully pray that a writ of certiorari issue to review the decision of the Nevada Supreme Court dismissing appeal entered in this matter on September 24, 1985.

OPINION BELOW

The opinion of the Supreme Court of the State of Nevada is not published. A copy of the order dismissing appeal appears in the Appendix hereto. Order denying rehearing also appears in the Appendix hereto.

JURISDICTION

The Order of the Supreme Court of the State of Nevada was entered on September 24, 1985. Petition for rehearing was timely filed on October 7, 1985. Order denying rehearing was entered June 26, 1986. This petition for a writ of certiorari was filed within 90 days of the order dismissing appeal, exclusive of the time during which petition for rehearing was pending. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether service of process by publication to a non-resident not reasonably calculated to give notice of lawsuit to a defendant is sufficient to give a court jurisdiction to render a money judgment.

2. Whether service of process by publication to a non-resident not reasonably calculated to give notice of lawsuit to a defendant affords due process.

STATUTORY PROVISIONS INVOLVED

United States Constitution 14th Amendment; Section 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nevada Rule of Civil Procedure 4(e)(1):

Copy attached in Appendix.

STATEMENT OF THE CASE

On or about December 5, 1979, Careys filed a complaint in the Eighth Judicial District Court of the State of Nevada, for the County of Clark against S. C. Sorensen, individually, and Sorensen Rambler, Inc., a Nevada corporation [sic], Defendants. Such complaint alleged that a lease was entered into between Careys and Cascade Mobile Homes, Inc., which lease was assigned to Sorensen Rambler, Inc., as assignee, on July 11, 1974. It is alleged that Sorensen Rambler, Inc., failed to pay rents coming due under such lease and that the corporate Defendant Sorensen Rambler, Inc., was the alter ego of the individual Defendant, S. C. Sorensen. Sorensen

Rambler, Inc., is not a Nevada corporation, but is in fact, a Montana corporation. At the time the action was commenced the individual defendant, S. C. Sorensen, was a non-resident of the State of Nevada, residing in the State of Colorado. The Careys purportedly served the individual Defendant, S. C. Sorensen, by publication and mailing and purportedly served Sorensen Rambler, Inc. by some sort of substituted service, as in the case of a domestic Nevada corporation. Judgment by default was entered July 29, 1980. Sorensen first learned of the judgment in March of 1981, when Careys enforced the Nevada default judgment against Sorensen's Colorado ranch.

Immediately after learning of the judgment, S. C. Sorensen and Sorensen

Rambler, Inc., filed their motion to quash service of process. The trial Court denied the motion to quash service and the Nevada Supreme Court, in Case No. 14103 between the same parties, dismissed appeal from order denying motion to quash on the basis that the trial Court's order was not appealable. Promptly on remand to the trial Court on September 29, 1983, S. C. Sorensen and Sorensen Rambler, Inc. filed motion to vacate judgment. This motion was denied and was appealed to the Nevada Supreme Court,whose decision dismissing appeal and denying rehearing are the subject of this petition for writ of certiorari.

The address used by Careys in their publication and mailing of process was a Montana business address which the corporation, Sorensen

Rambler, Inc., had maintained years before prior to assuming the lease, the subject of the action, was never the residence address of S. C. Sorensen, and at the time of commencement of the action, Sorensen was a resident of the State of Colorado and never had any notice of the lawsuit.

Petitioners raised the question of their right to constitutional due process at the trial level, and urged this constitutional right on appeal and in their petition for rehearing. Brief of Defendant S. C. Sorensen in support of motion to quash service of process, filed June 17, 1981, p. 3, lines 29 through 31:

> "(e) Due process requires that a non-resident defendant receive actual notice of the pendency of the action by personal delivery."

REASONS FOR GRANTING THE WRIT

The decision of the Nevada Supreme Court has the effect of depriving petitioners of their property without due process. The 14th Amendment to the United States Constitution guarantees to all persons minimal due process of law when they are to be deprived of some right.

Section 1 of the 14th Amendment states:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The rule authorizing service of process by publication, or substituted service, so as to secure an in personam money judgment, is unconstitutional, and constitutes the taking of the property of the

appellants without due process of law because the method of service did not provide actual notice of the action to the appellants, and was not reasonably calculated to give actual notice of the action to the appellants.

There was no unreasonable delay. Appellants had no knowledge of the judgment entered against them for more than one year after the judgment was entered. Upon learning of the judgment, appellants immediately brought a proceeding to quash service of process. This motion was denied and was appealed by appellants. After more than a year before the Supreme Court, the Supreme Court on its own motion dismissed the appeal, ruling that the denial of motion to quash service of process was not an appealable order and in making the dismissal, the Supreme

Court of the State of Nevada ignored the request of both appellants and respondents to consider the appeal as a petition for extraordinary writ.

Promptly after the Supreme Court dismissed the appeal as being from a nonappealable order, appellants moved the Court to vacate the judgment. There was therefore, no violation of either Nevada Rule of Civil Procedure 60(b) or (c) as to the time limits when such motion could be made, as such limitations could not apply where appellants had no knowledge of the judgment.

It would be specious to say that such time limits provided by NRCP 60(b) or (c) were triggered when appellants learned of the judgment when such time limits could not have been triggered at the time of judgment.

Where there is defective summons there is no personal jurisdiction. See MJS Enterprises, Inc., v. The Superior Court of Kings County, 154 Cal.App. 3rd. 535 (1984).

> "Upon the hearing of the motion, evidence was introduced to show that appellants had been making monthly payments to the Hursh Agency for transmission to the respondents for a period of more than 10 years prior to the commencement of the action in the court below, and even made such payments during the pendency of the action and after judgment. It appears to us that under these circumstances the whereabouts of the respondents could have been ascertained by the exercise of some diligence. Good faith and due diligence on the part of appellants, in our judgment, would have prompted them to inquire of the Hursh Agency as to the residence of their clients. See: Wildes v. Lou Dillon M. Co., 41 Nev. 364, 170 P. 1046.
>
> "Although the trial court never acquired jurisdiction to make the order for publication of summons, or to enter judgment, the lower court did not specifically hold to to such effect. Nonetheless, since the order was void, a judgment based thereon would

likewise be void. We have held that a correct judgment will not be reversed simply because it was based on a wrong reason. Nelson v. Sierra Construction Corp., 77 Nev. 334, 364 P.2d 402. There is no reason why this rule should not be extended to an appealable order.

"Under NRCP 60(b), a motion to set aside a void judgment is not restricted to the six (6) months period specified in the Rule. NRCP 54(a) provides that the word 'judgment' as used in these rules includes any order from which an appeal lies. Therefore, there is no merit to appellant's contention that the motion to vacate the judgment was not timely made.

'Affirmed.'" Foster v. Lewis, 78 Nev. 330, 336-337, 372 P.2d 679 (1962).

"Hatch v. Princess Louise Corp. 13 Wash.App. 378, 534 P.2d 1036 (1975) is directly on point and we adopt the ratio decidendi thereof. There Princess Louise Corp. was personally served in California, but did not appear in the action in Washington. After a default judgment was entered, the Plaintiff filed the statutory affidavit. On appeal, the judgment of the trial court was reversed as to the exercise of in personam jurisdiction over the defendant, and the judgment was held void.

"At the time the judgment was

entered against the Princess Louise Corp. there had not been substantial compliance with the statute. Indeed, there had been no compliance at all insofar as the affidavit required by subsection (4) is concerned. The court acquired no jurisdiction and and so its judgment is void.

"Hatch v. Princess Louise Corp., supra, at 380, 534 P.2d at 1038. The Schells maintain that Hatch is in direct conflict with Ryland v. Universal Oil Co. 8 Wash.App. 43, 504 P.2d 1171 (1972). In that case, the affidavit, although late, was filed before judgment and jurisdiction over the defendant was accordingly upheld. We fail to see the conflict. As stated in Barer v. Goldberg, 20 Wash.App. 472 at 482, 582 P.2d 868 (1978):

'No particular time of filing is required as long as it precedes the judgment.' (Emphasis ours). Here the statute was ignored. Any other holding would eliminate the statutory requirement of the affidavit unless it was challenged.

"According to CR55(c) and 60(b)(5), a default judgment may be set aside if it is void. The defendant need not offer a meritorious defense if the challenge to the judgment is based upon lack of personal jurisdiction. Hatch v. Princess Louise Corp., supra; Bennett v. Supreme Tent of the Knights

of the Maccabees of the World, 40 Wash. 431, 82 P. 744 (1905). 'Judgment is reversed.' Schell v. Tri-State Irrigation, 22 Wash.App. 788, 591 P.2d 1222, 1224 (1979)."

"This 'long-arm' statute is also limited by the due process clause." Schell v. Tri-State Irrigation, supra, at 1223.

"The Schells contend that the required showing of injury to the defendant 'must, common sense tells us, be something other than the taking of the judgment.' We disagree. A judgment entered without valid personal jurisdiction over the defendant violates due process." Schell v. Tri-State Irrigation, supra at 1224.

"If a court has never acquired jurisdiction over a defendant or the subject matter, failure to abide by time limits is of no consequence whatsoever, since any judgment ultimately entered is void and subject to collateral attack. While both personal jurisdiction and venue objections can be waived, a defendant hardly waives a jurisdiction objection by the mere passage of time. Absence of waiver is supported in this case by the fact that the first and only action taken by defendants was to move---albeit after expiration of the time

period established by the Rules---to dismiss for lack of jurisdiction.

"Accordingly, the fact of default does not preclude consideration of defendant's objections to this court's jurisdiction." Bartels v. International Commodities Corp., 435 F.Supp. 865 at 867 (1977), and Ibid. fn 5, p. 867:

"Consideration of the motion to dismiss would be proper even if the jurisdictional objection did not ultimately prevail. Given the strong policy in favor of deciding suits on the merits rather than by default, 6 Moore's Federal Practice §55,01[1], it would be anomalous to hold defendants disabled from defending the suit on the merits because they relied in good faith on a non-frivolous but erroneous view of the law on jurisdiction. See Latini v. R. M. Dubin Corp., 90 F.Supp. 212 (N.D.Ill. 1950)."

See also Taylor v. United States 145 F.2d 641, at 643.

There were substantial defenses to the complaint of the Careys. It is denied that S. C. Sorensen, individual, was the alter ego of Sorensen

Rambler, Inc., an alleged Nevada corporation, but in fact, a Montana corporation. Additionally, the leased property was re-leased during the same period for which damages were recovered. The judgment could never have been entered if the Defendants had ever been afforded notice and an opportunity to be heard. The right to procedural due process is a constitutional guarantee. Vitek v. Jones, 445 U.S. 480, 490 fn 6 (1980).

The case of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) has long set the standard for minimal due process:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum, they require that deprivation of life, liberty or property by adjudication be preceded by a notice and opportunity for hearing

appropriate to the nature of the case." Ibid. at 313.

CONCLUSION

The two-year delay decried by the Nevada Supreme Court in its Order was the two years it took the Nevada Supreme Court to decide that an Order denying motion to quash service was non-appealable.

For the reasons presented above, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

DATED: July 30, 1986

Respectfully submitted,

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Counsel for Petitioners

APPENDIX

IN THE SUPREME COURT OF THE STATE OF NEVADA

S. C. SORENSEN, SORENSEN RAMBLER, INC.,	)	
	)	No. 15561
Appellants,	)	
vs.	)	
PAUL J. CAREY and MARILYN IREN CAREY POTTER,	)	
Respondents.	)	

FILED
SEP 24 1985
Clerk of Supreme Court
By/s/Jeanne C. Richards
Deputy Clerk

ORDER DISMISSING APPEAL

This is an appeal from an order of the district court refusing to set aside a default judgment.

Appellants primarily contend that the default judgment against S. C. Sorensen was void because service of process was ineffective. We disagree. Our review of the record indicates that

service of process upon appellant Sorensen was properly effected pursuant to NRCP 4(e)(1).

Appellants next contend that, in any event, the district court abused its discretion by refusing to set aside the default judgment. We disagree. Appellants brought their motion to set aside the default judgment over two years after they learned of the judgment. The motion to set aside the judgment was thus untimely under either NRCP 60(b) or (c). The district court therefore properly refused to set aside the judgment. See Rae v. All American Life & Cas. Co., 95 Nev. 920, 923, 605 P.2d 196, 198 (1979). We have considered appellants' remaining contentions and conclude that they also lack merit.

Accordingly, we hereby

ORDER this appeal dismissed.

/s/Springer, C.J.
Springer

/s/Mowbray, J.
Mowbray

/s/Gunderson, J.
Gunderson

/s/Steffen, J.
Steffen

/s/Young, J.
Young

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IN THE SUPREME COURT OF THE STATE OF NEVADA

S. C. SORENSEN, SORENSEN RAMBLER, INC.,

Appellants,

vs.

PAUL J. CAREY and MARILYN IREN CAREY POTTER,

Respondents.

No. 15561

FILED
JUN 26 1986
By/s/Judith Fountain
Clerk of Supreme Court

ORDER DENYING REHEARING

Rehearing denied. NRAP 40.

It is so ORDERED.

/s/Springer, C.J.
Springer

/s/Mowbray, J.
Mowbray

/s/Gunderson, J.
Gunderson

/s/Steffen, J.
Steffen

/s/Young, J.
Young

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RULE 4. PROCESS

(e). Same: Other Service.

(1) Service by Publication.

(i) General. When the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, and that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of summons.

Provided, when said affidavit is based on the fact that the party on whom service is to be made resides out of the state, and the present address of the party is unknown, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this state in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which such party resided to

the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this state; and, in such case, it shall be presumed that such party still resides and remains out of the state, and such affidavit shall be deemed to be a sufficient showing of due diligence to find the defendant. This rule shall apply to all manner of civil actions, including those for divorce.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) **Mistakes; Inadvertence; Excusable Neglect; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party which would have heretofore justified a court in sustaining a collateral attack upon the judgment; (3) the judgment is void; or, (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(c) **Default Judgments: Defendant Not Personally Served.** When a default judgment shall have been taken against any party who was not personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, and who has not entered his general appearance in the action, the court, after notice to the adverse party, upon motion made within six months from the date of rendition of such judgment, may vacate such judgment and allow the party or his legal representatives to answer to the merits of the original action. When, however, a party has been personally served with summons and complaint, either in the State of Nevada or in any other jurisdiction, he must make his application to be relieved from a default, a judgment, an order, or other proceeding taken against him, or for permission to file his answer, in accordance with the provisions of subdivision (b) of this rule.